SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY

PRESENT: HON. PAUL WOOTEN **PART** 97
Justice

SENTOSACARE LLC, BENJAMIN LANDA, BENT PHILIPSON, AVALON GARDENS REHAB AND HEALTH CARE CENTER, SOUTH POINT PLAZA NURSING & REHABILITATON CENTER, PARKVIEW CARE AND REHABILITATION CENTER, THE HAMPTONS CENTER FOR REHABILITATION AND NURSING, and WOODMERE REHABILITATION & HEALTH CENTER,

Plaintiffs,

- against -

JENNIFER LEHMAN and ALLEGRA ABRAMO,

Defendants.

INDEX NO. 504407/2016

SEQ NO. 2

The following e-filed papers read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	73-78
Opposing Affidavits (Affirmations)	
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Before the Court in this action by plaintiffs SentosaCare, LLC (SentosaCare), Benjamin Landa (Landa), Bent Philipson (Philipson), Avalon Gardens Rehab and Health Care Center (Avalon Gardens), South Point Plaza Nursing & Rehabilitation Center (South Point), Parkview Care and Rehabilitation Center (Parkview), The Hamptons Center for Rehabilitation and Nursing (Hamptons), and Woodmere Rehabilitation & Health Care Center (Woodmere) (collectively, plaintiffs) against defendants Jennifer Lehman and Allegra Abramo (collectively,

defendants), seeking to recover damages for alleged defamation, is a motion by plaintiffs for an Order: (1) pursuant to CPLR 2221, granting reargument of the Court's Decision and Order, dated January 12, 2018 and filed on January 30, 2018 (Prior Decision), which granted defendants' motion to dismiss their complaint, with prejudice and without leave to amend; and (2) upon reargument, reversing, in part, that portion of the Decision and Order dismissing their complaint.

Factual and Procedural Background

SentosaCare is a consulting company that provides services to skilled nursing facilities in the State of New York. These nursing facilities include Avalon Gardens, South Point, Parkview, Hamptons, and Woodmere (collectively, the SentosaCare affiliated nursing facilities). SentosaCare's principals are Landa and Philipson. Landa and Philipson and their family members have ownership interests in several of the SentosaCare affiliated nursing facilities. SentosaCare has contractual relationships with all of the SentosaCare affiliated nursing facilities.

Defendants are the authors of an article, entitled "How N.Y.'s Biggest For-Profit Nursing Home Group Flourishes Despite a Record of Patient Harm" (the article), which was published on ProPublica.org, an internet website, on October 27, 2015. ProPublica, which has not been named as a defendant herein, is a Pulitzer-prize winning, independent, non-profit organization which publishes investigative journalism on matters of public interest and concern, and particularly publishes stories that seek to vindicate the rights of those who cannot speak or act for themselves. Defendants are not employees of ProPublica.

The lede of the article stated that "[t]he state's 'character-and-competence' reviews are supposed to weed out operators with histories of violations and fines – but regulators don't always act on the full story." The remainder of the article repeatedly referenced, and, in many instances, provided direct links to, the results of the New York State Department of Health (the

DOH) Character & Competence Reviews, Inspections, and Complaints, the federal Centers for Medicare and Medicaid Services (the CMS) data, and investigations by the Attorney General's Office as the sources.

On March 24, 2016, plaintiffs filed this defamation action against defendants. Plaintiffs' complaint referred to thirteen claims, which consisted of statements or groups of statements which plaintiffs claimed were defamatory. On June 21, 2016, defendants moved, under motion sequence number one, for an Order, pursuant to CPLR 3211(a)(1), (a)(7), and (g), dismissing plaintiffs' complaint in its entirety, with prejudice and without leave to amend, on the grounds that: (1) documentary evidence resolved all factual issues and conclusively disposed of plaintiffs' claim; (2) plaintiffs' complaint failed to state a cause of action for defamation; and (3) this action was a Strategic Lawsuit Against Public Participation (SLAPP), as defined in New York Civil Rights Law § 76-a and § 70-a. Plaintiffs opposed defendants' motion. The Court, in its Prior Decision, granted defendants' motion to dismiss plaintiffs' complaint in its entirety.

Standard

A motion to reargue must "be based upon matters of fact or law allegedly overlooked or misapprehended by the Court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]; *see also McDonald v Stroh*, 44 AD3d 720, 721 [2d Dept 2007]; *Matter of Hoffmann v Debello-Teheny*, 27 AD3d 743, 743 [2d Dept 2006]; *Daluise v Sottile*, 15 AD3d 609, 609 [2d Dept 2005]). The purpose of a motion to reargue is not "to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]; *see also Mazinov v Rella*, 79 AD3d 979, 980 [2d Dept 2010]; *McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]; *Matter of Mayer v National Arts Club*, 192 AD2d 863, 865 [3d Dept 1993]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], *lv dismissed in part, denied in*

part 80 NY3d 1005 [1992], *rearg denied* 81 NY3d 782 [1993]; *Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 971 [1st Dept 1984]; *Richardson Lindenbaum & Young*, 14 Misc 3d 1223[A], 2007 NY Slip Op 50130[U], *3 [Sup Ct, Kings County 2007], *affd in part, appeal dismissed in part* 56 AD3d 645 [2d Dept 2008]; *Bankers Trust Co. of Cal. v Payne*, 188 Misc 2d 726, 729 [Sup Ct, Kings County 2001]; *American Trading Co. v Fish*, 87 Misc 2d 193, 195 [Sup Ct, NY County 1975]).

Discussion

In its Prior Decision, this Court held that Civil Rights Law § 74 was a complete bar to all of plaintiffs' claims. The Court, in so ruling, noted that "[t]he purpose of Civil Rights Law § 74 'is the protection of reports of [official] proceedings which are made in the public interest'" (*Cholowsky v Civiletti*, 69 AD3d 110, 114 [2d Dept 2009], quoting *Williams v Williams*, 23 NY2d 592, 599 [1969]). The Court, in reviewing case law precedent, observed that "'[t]he case law has established a liberal interpretation of the 'fair and true report' standard of Civil Rights Law § 74 so as to provide broad protection to news accounts of judicial or other official proceedings'" (*Cholowsky*, 69 AD3d at 114, quoting *Becher v Troy Publ. Co.*, 183 AD2d 230, 233 [3d Dept 1992]). Furthermore, the Court observed that "[t]he privilege under Civil Rights Law § 74 is absolute and applies even where the plaintiff alleges malice or bad faith" (*see Panghat v New York State Div. of Human Rights*, 89 AD3d 597, 597 [1st Dept 2011], *lv denied* 19 NY3d 839 [2012], *cert denied* 569 US 943 [2012]).

The Court relied upon the holding by the Court of Appeals that "[w]hen determining whether an article constitutes a 'fair and true' report, the language used therein should not be dissected and analyzed with a lexicographer's precision" (*Alf v Buffalo News, Inc.*, 21 NY3d 988, 990 [2013] [internal quotation marks omitted]). The Court noted that, instead, the relevant inquiry is whether the article "provided substantially accurate reporting" (*id.*; *see also Saleh v New York Post*, 78 AD3d 1149, 1151 [2d Dept 2010], *lv denied* 16 NY3d 714 [2011]).

The Court further explained that in order "[f]or a report to be characterized as 'fair and true' within the meaning of [Civil Rights Law § 74], thus immunizing its publisher from a civil suit sounding in libel, it is enough that the substance of the article be substantially accurate" (*Holy Spirit Assn. for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 67 [1979]). The Court noted that this is consistent with the common law of libel, which "'overlooks minor inaccuracies and concentrates upon substantial truth'" (*Shulman v Hunderfund*, 12 NY3d 143, 150 [2009], quoting *Masson v New Yorker Magazine*, Inc., 501 US 496, 516 [1991]; *see also Cholowsky*, 69 AD3d at 114). The Court observed that "[j]udicial interpretation of section 74 has made it clear that an article need not be a verbatim account or even a precisely accurate report of an official proceeding to be a 'fair and true report' of such a proceeding" (*Freeze Right Refrig. & AC. Servs. v City of New York*, 101 AD2d 175, 183 [1st Dept 1984], citing *Briarcliff Lodge Hotel, Inc. v Citizen-Sentinel Publs.*, 260 NY 106 [1932], *rearg denied* 261 NY 537 [1933]).

The Court, in its Prior Decision, set forth that the test of whether statements are "substantially accurate" so that the absolute privilege of common-law attaches "is whether the published account of the proceeding would have a different effect on the reader's mind than the actual truth, if published" (*Daniel Goldreyer, Ltd. v Van de Wetering*, 217 AD2d 434, 436 [1st Dept 1995]). The Court explained that it is only where the published statements at issue, considered in the context of the article, "suggests more serious conduct than that actually suggested in the official proceeding," that the privilege will not attach (*id.*).

Plaintiffs, in their instant motion, no longer dispute that Civil Rights Law § 74 is applicable to this action. Plaintiffs also no longer dispute that the statements at issue in their first, second, third, fourth, fifth, sixth, seventh, tenth, eleventh, twelfth, and thirteenth claims

were substantially accurate, and, therefore, absolutely privileged under Civil Rights Law § 74, and properly dismissed by the Court.

In their instant motion, plaintiffs dispute the dismissal of two out of their thirteen claims, to wit, their eighth claim and their ninth claim. Plaintiffs' eighth claim was that the article stated that

> "[o]n multiple occasions, state inspectors discovered that staff at [SentosaCare affiliated nursing facilities] tried to cover up lapses in care-allegedly lying about elopements or the failure to spot bedsores," and that after a 2012 investigation by the New York State Attorney General, the administrator of Hamptons, a SentosaCare affiliated nursing facility, pled guilty to falsifying records after a resident wandered away from the facility.

Plaintiffs asserted that the statement that state inspectors "discovered" that staff at SentosaCare affiliated nursing facilities tried to cover up lapses in care is false because the facility pro-actively reported the actions of its administrator to the the DOH and the Attorney General's Office, and that if not for the facility's self-reporting, the falsification of records would not have been discovered, and the administrator would likely have continued working in the nursing home industry. Plaintiffs alleged that the DOH and the Office of the Attorney General cleared the facility of any wrongdoing, finding that the rogue administrator acted contrary to the facility protocol and the admonition of her supervisor. They claimed that defendants knew, but did not report, these facts, and that the reporting of these additional facts were necessary to make the article truthful and not misleading.

Plaintiffs' ninth claim was that the article stated that

> "after another investigation by" the Attorney General's Office, four nurses at Woodmere, a SentosaCare affiliated nursing facility, were arrested for falsely signing off on forms indicating they had checked on a resident who had fallen three times in a week and ended up hospitalized. Plaintiffs alleged that defendants knew, but failed to report, that the facility had conducted its own internal investigation, that the facility immediately terminated the employment of the nurses in question, and that the facility self-reported its findings to the DOH and the Attorney General's Office.

Plaintiffs pointed out that the facility had submitted a plan of correction (POC) to the DOH that was approved, and the facility was thereafter found to be back in substantial compliance. They asserted that defendants should not have omitted these additional facts, and that the inclusion of these additional facts were necessary to make the article truthful and not misleading.

Plaintiffs argue that the Court misapprehended the facts and misapplied the law with respect to their eighth and ninth claims. They claim that the Court should have construed their complaint more liberally to find that these claims were actionable.

With respect to their eighth claim, plaintiffs assert that the Attorney General did not "discover" anything, nor did the Attorney General uncover anything "after" an investigation. Plaintiffs contend that the term "discover" means that someone found something for the first time on his or her own. They assert that the wrongdoing detailed in the article was self-reported, and that this was what led to charges against its employees. They argue that this should not have been omitted from the article. They criticize the use of the verb "discovered," and state that defendants implied by the term "discovered" that the staff at SentosaCare affiliated nursing facilities tried to cover up lapses in care and somehow condoned this behavior.

With respect to their ninth claim, plaintiffs assert that the use of the words "after another investigation by" the Attorney General's Office, is susceptible to the same negative connotation. Plaintiffs argue that by using the words "after another investigation by," this statement implies that some or all of them were complicit in the illegal activity, and that this activity was discovered only after a government investigation.

However, in its Prior Decision, the Court specifically addressed and rejected the very same arguments by plaintiffs. The Court pointed out that plaintiffs could not dispute that the article accurately reported that two separate investigations by the Attorney General led to

criminal charges against a number of individual employees at two SentosaCare affiliated nursing facilities. The Court noted that this was evidenced by the Attorney General's press release, which stated that these individuals were charged with a "shocking level of neglect and mistreatment, which caused serious injury to a patient." The Court found that while plaintiffs argued that the word "discover" should not have been used because one facility self-reported the actions of its administrator to the DOH and the Attorney General's Office and the other conducted its own internal investigation, the fact remained that this conduct occurred at these facilities regardless of who reported it. The Court held that there was nothing about the word "discover" that suggested more serious or widespread fraudulent, dishonest, or criminal conduct than that suggested in the official proceeding and summarized in the article. The Court ruled that while plaintiffs argued that the article omitted information favorable to them, they could not show that the published account of the investigation proceedings "would have a different effect on the reader's mind" or "suggest[ed] more serious conduct than that actually suggested in the official proceeding" (*see Daniel Goldreyer, Ltd.*, 217 AD2d at 436).

As previously discussed in the Prior Decision, when determining whether the article constitutes a "fair and true" report, the language used in the article "should not be dissected and analyzed with a lexicographer's precision" (*Holy Spirit Assn. for Unification of World Christianity*, 49 NY2d at 68). Newspaper accounts of official proceedings "must be accorded some degree of liberality" (*id.*). "[I]t is enough that the substance of the article [is] substantially accurate" (*id.* at 67). Plaintiffs contend that the Court's determination should not have been made on a motion to dismiss. They argue that the determination of whether statements constitute a fair and true report must be left to a jury. This argument is rejected. In the recent case of *Gillings v New York Post* (166 AD3d 584, 586 [2d Dept 2018]), the Appellate Division, Second Department, granted a defendant's motion to dismiss, pursuant to CPLR 3211, finding, as a matter of law, that disputed language in a newspaper article was a "fair and true" report of the

factual findings made in a divorce action. Here, the disputed language in the article may similarly be characterized as 'fair and true' within the meaning of Civil Rights Law § 74, as a matter of law since its substance is substantially accurate (*see Holy Spirit Assn. for Unification of World Christianity*, 49 NY2d at 67; *Gillings*, 166 AD3d at 586).

Thus, plaintiffs, in their motion, are merely seeking to rehash the issues by reiterating their prior arguments which have already been fully considered, addressed, and determined by the Court. Plaintiffs have failed to provide any facts or law demonstrating that the Court, in arriving at its conclusion, misapprehended or overlooked the applicable law or facts. Therefore, there is no valid basis set forth by plaintiffs for reargument of the Court's Prior Decision insofar as it dismissed their eighth and ninth claims based upon Civil Rights Law § 74.

Plaintiffs also base their motion for reargument upon their contention that the Court improperly determined that they are public figures. Plaintiffs vehemently contend that they are not public figures. They argue that the Court misapprehended the case law it cited and relied upon to make this determination. With respect to the issue of whether plaintiffs are public figures, the sole discussion of this by the Court in its Prior Decision is as follows:

> "Additionally, the court *notes, in passing, that even assuming, arguendo*, that Civil Rights Law § 74 was not applicable, plaintiffs would still have to satisfy a high burden of proof applicable to the news media. Plaintiffs, who receive substantial federal funding and engage in business activities which are a matter of public concern, are public figures (*see Gertz v Robert Welch, Inc.*, 418 US 323, 345 [1974]; *Huggins v Moore*, 94 NY2d 296, 301-302 [1999]). Therefore, defendants may only be held liable if they published information they knew was false or acted with reckless disregard of the truth (*see New York Times Co.*, 376 US at 279-280). Here, the documentary evidence submitted by defendants establishes that this standard has not been met by plaintiffs" (emphasis added).

It is important to note that the above-quoted paragraph was merely dictum since the Court, in the preceding paragraph, had already ruled that since "the statements at issue are

'substantially accurate' summaries of actions that are within the prescribed duties of public bodies and are, therefore, absolutely privileged under Civil Rights Law § 74 . . ., dismissal of this action, pursuant to CPLR 3211(a)(1) and (7), is mandated." Thus, dismissal of this action did not rest upon a finding that plaintiffs were public figures, but, rather, was predicated on the Court's finding that the statements at issue were absolutely privileged under Civil Rights Law § 74.

Plaintiffs, however, have devoted a considerable portion of their memorandum of law in support of their instant reargument motion to this issue, and made this a major point in their oral argument in support of this reargument motion. Thus, while the Court's decision to dismiss plaintiffs' complaint was based upon Civil Rights Law § 74 and its statement with respect to plaintiffs' status as public figures was dictum, in view of plaintiffs' argument and the important public policy issues implicated, the Court grants reargument in order to provide clarification with respect to this issue.

Initially, the Court notes that plaintiffs criticize the Court's citation to *Gertz* (418 US at 345) and *Huggins* (94 NY2d at 301-302). They argue that these cases did not involve a question of whether a plaintiff who received government funding should be considered a public figure and attempt to distinguish the facts of these two cases from the case at bar. *Gertz*, however, was simply cited because it is the leading case in defining a public figure. *Huggins* (94 NY2d at 301) was cited because in that case, the Court of Appeals, citing *New York Times Co. v Sullivan* (376 US 254, 279-280 [1964]), discussed the well established principle that in a defamation action against a public figure, "a plaintiff must prove the statement was made with 'actual malice,' i.e., with either knowledge that it was false or reckless disregard for the truth." *Huggins* (94 NY2d at 301) was also cited by the Court for the general proposition that "[p]ublic figures for constitutionalized defamation purposes include 'limited-purpose' public figures."

"Whether plaintiff is a public figure is, in the first instance, a question of law to be determined by the court" (*White v Berkshire-Hathaway*, 195 Misc 2d 605, 606 [Sup Ct, Erie County 2003], *affd sub nom. White v Berkshire-Hathaway, Inc.*, 5 AD3d 1083 [4th Dept 2004]; *see also Rosenblatt v Baer*, 383 US 75, 88 [1966]; *Dameron v Washington Mag., Inc.*, 779 F2d 736, 740 [DC Cir 1985], *cert denied* 476 US 1141 [1986]; *Waldbaum v Fairchild Publs., Inc.*, 627 F2d 1287, 1293 n 12 [DC Cir 1980], *cert denied* 449 US 898 [1980]; *Medure v New York Times Co.*, 60 F Supp 2d 477, 484 [WD Pa 1999]). "A public figure is one who has voluntarily invited close public scrutiny by thrusting himself [or herself] into the public arena" (*Reliance Ins. Co. v Barron's*, 442 F Supp 1341, 1347 [SD NY 1977]).

The United States Supreme Court, in *Gertz* (418 US at 345), created two categories of public figures: (1) "persons who are public figures for all purposes;" and (2) those persons "who are public figures for particular public controversies," who are commonly referred to as limited-purpose public figures (*see also Waldbaum*, 627 F2d at 1292; *see also White v Tarbell*, 284 AD2d 888, 889 [3d Dept 2001]). A limited-purpose public figure has been defined as "an individual [who] voluntarily injects himself [or herself] or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues" (*Gertz*, 418 US at 351; *see also White*, 195 Misc 2d at 606).

In *Trans World Accounts, Inc. v Associated Press* (425 F Supp 814, 819 [ND Cal 1977]), it was held that public figure status should apply to corporations for purposes of applying the First Amendment to defamation claims, without any distinction between corporations and individuals. Prior to that decision, it had been held in *Martin Marietta Corp. v Evening Star Newspaper Co.* (417 F Supp 947, 956 [D DC 1976]) that "actual malice must be proven with convincing clarity in any libel action brought by a corporation against a mass media defendant, if the defendant establishe[d] that the publication in issue concerned matters of legitimate public

interest." In *Trans World Accounts, Inc.* (425 F Supp at 819), the Federal District Court for the Northern District of California rejected the approach of *Martin Marietta Corp.*, preferring to apply the *Gertz* standard to corporations as well as natural persons. In *Reliance Ins. Co.* (442 F Supp at 1347), the Federal Court for the Southern District of New York held that it was preferable to follow *Trans World Accounts, Inc.* in considering whether a corporation was a public figure in accordance with the terms set forth in *Gertz*. Thus, although plaintiffs are not individuals, except for Landa and Philipson, the Court shall apply the standards enunciated in *Gertz*.

In order to qualify as a public controversy, the outcome of the dispute must be one "which affects the general public or some segment of it in an appreciable way" (*Krauss v Globe Intl.*, 251 AD2d 191, 192 [1st Dept 1998] [citations and internal quotation marks omitted]; *see also Arrigoni v Velella*, 110 AD2d 601, 603 [1st Dept 1985]). Here, plaintiffs' participation and involvement in the nursing home industry constitute disputes affecting the elderly population, a group deserving of protection and whose care affects not only them, but also their families who have entrusted the care of their loved ones to nursing homes.

The Court next examines "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation" (*Gertz*, 418 US at 352; *Waldbaum*, 627 F2d at 1292). "This is an objective test to view the facts of a situation, taken as a whole, through the eyes of a reasonable person" (*White*, 195 Misc 2d at 607; *see also Waldbaum*, 627 F2d at 1293). Here, plaintiffs, who are all involved in the business of skilled nursing facilities, have engaged in activities which, by their nature, have drawn them into legitimate public controversy, namely, the safety of nursing home residents. It was plaintiffs who have used public funds to successfully develop and operate the nursing homes at issue. It was the cited deficiencies and lapses in care in operating the nursing homes which led to an investigation by the New York State Attorney General and invited attention and comment. Plaintiffs have not only sought and received public monies and are involved in a controversial industry, which, by its nature,

necessitates scrutiny, their conduct and practices in the running of the nursing homes and the care of their patients strongly support a finding that they are limited-purpose public figures (*see Waldbaum*, 627 F2d 1287 [1980]; *White*, 195 Misc 2d at 608).

Significantly, in *Cholowsky* (69 AD3d at 111), the plaintiff therein obtained a permit from the New York State Department of Environmental Conservation to operate a solid waste facility. Newspaper articles published by the defendant newspaper therein reported, among other things, that the plaintiff was involved in a "bribery scheme" to gain access to the Brookhaven landfill, and the plaintiff sued for defamation (*id.* at 112). The Supreme Court, Suffolk County, in *Cholowsky* (16 Misc 3d 1138[A], 2007 NY Slip Op 51742[U], *5, *affd* 69 AD3d 110 [2d Dept 2009]), found that the defendants therein were reporting on a matter of legitimate public interest, and ruled, under the standard set forth in *Chapadeau v Utica Observer-Dispatch* (38 NY2d 196, 199 [1975]), that if a newspaper defames a private figure, it can only be held liable if the reporting was "grossly irresponsible." It found that the plaintiff had failed to meet that standard (*id.*). The Appellate Division, Second Department, in *Cholowsky*, however, held that the plaintiff was not a private figure subject only to the *Chapadeau* standard, but as an operator of a solid waste disposal facility, he was a limited-purpose public figure because he had "thrust himself into the forefront of a public controversy by engaging in business activities which were a matter of public concern" (69 AD3d at 115-116). Here, plaintiffs have similarly thrust themselves into the forefront of a public controversy by their operation of nursing home facilities, which is a matter of public concern.

Plaintiffs argue that they are not public figures since they did not "thrust" themselves into the news media. This is simply untrue. By their very nature as large government-regulated nursing facilities, and additionally because of their voluntary decision to operate and open nursing facilities, plaintiffs have, in fact, thrust themselves into the public eye (*see Reliance Ins.*

Co., 442 F Supp at 1349). The Court must acknowledge that the public interest is well served by encouraging the free press to investigate and comment on these businesses.

Skilled nursing facilities in New York, such as the SentosaCare affiliated nursing facilities, are subject to close regulation and continuous oversight and inspection from the DOH, which can impose fines and other penalties as a result of its inspections. As previously discussed in the Prior Decision, the CMS gives the DOH the authority to monitor nursing home compliance with applicable federal regulations and investigate complaints regarding patient care and safety (*see* 42 CFR Part 488.2). The DOH then provides inspection reports to the CMS, and these agencies, often acting collaboratively, can, in turn, assess fines and other penalties against the nursing facilities. Both the DOH and the CMS make the records of complaints, deficiencies, violations, and fines with respect to each nursing facility available to the public.

Indeed, a new nursing facility may not even be established and the ownership of a nursing facility may not be changed without a person first submitting a Certificate of Need (CON) to the DOH. The DOH then performs a Character & Competence review of the applicant and its existing facilities and summarizes violations and/or fines and its recommendations for the DOH Public Health and Health Planning Council (*see* Public Health Law § 2801-a[3]).

The DOH has reviewed the SentosaCare affiliated nursing facilities owned by Landa and Philipson in connection with at least 15 separate CON change-of-ownership applications. The DOH records show that sanctions were imposed by the DOH against the SentosaCare affiliated nursing facilities.

Plaintiffs, in support of their contention that they are not public figures, heavily rely upon *Hutchinson v Proxmire* (443 US 111 [1979]). *Hutchinson*, however, is readily distinguishable from the case at bar. In *Hutchinson*, the plaintiff was merely a recipient of government research grants and was not subject to continual government oversight. Moreover, the statements at

issue therein did not pertain to any deficiency in conduct in complying with governmental oversight, but, rather, they pertained to a broader discussion about public expenditure. Also, in *Hutchinson*, the plaintiff had no access to the media and was not otherwise embroiled in the issue of public expenditures until he was drawn into it by the defendants therein. Based on those facts, the United States Supreme Court held that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure" (*Hutchinson*, 443 US at 135).

Hutchinson stands in sharp contrast to the facts here where it is not defendants who have made plaintiffs limited-purpose public figures. Unlike in *Hutchinson*, plaintiffs can only expand their network of nursing facilities with government permission, are subject to continual government oversight, have repeatedly petitioned the government to expand, and are very much involved in news and other debates related to nursing facilities, all of which are directly relevant to the statements at issue made by defendants. Plaintiffs are entities whose business activities are particularly clothed with the public interest. This is precisely the sort of activity that the public needs to have adequately investigated and reported and is the sort of information which must be afforded heightened First Amendment protection.

Plaintiffs contend that they cannot be found to be public figures on the basis that they receive federal and state funding. Contrary to plaintiffs' contention, the basis for the Court's determination that plaintiffs are limited-purpose public figures is not so broad. Plaintiffs are not just any individual or business who receives funding from a government agency or program. Rather, as previously noted, plaintiffs are operating highly regulated businesses which are subject to continuous government oversight which reflect a special magnitude of public dependence and involvement, and are a matter of legitimate public interest. As discussed

above, plaintiffs cannot even open new facilities or acquire existing ones without government permission.

Moreover, the article at issue in this action pertains directly to plaintiffs' businesses and to government oversight. Indeed, the article is about the very conduct that is the subject of governmental oversight. In fact, the article repeatedly referenced, and, in many instances, provided direct links to, the results of DOH Character & Competence Reviews, Inspections, and Complaints, CMS data, and investigations by the Attorney General's Office as its sources. Public figure status has been found where businesses are subject to close state regulation and oversight (*see e.g. Reliance Ins. Co.*, 442 F Supp at 1348 [holding that the plaintiff was a public figure where it did "business is in a field subject to close state regulation"]).

Plaintiffs do not deny that they have frequently been the subject of press reports, and have provided comments to the press, on the subject of their nursing facilities, well before the article in this lawsuit.[1] Plaintiffs contend that they have not become public figures because articles have been written by other people about them. However, this does not change the fact that plaintiffs have thrust themselves into the forefront of a public controversy by their operation of nursing home facilities, which is a matter of public concern. Moreover, in view of the First Amendment, public policy considerations, society's strong interest in the free flow of information with respect to the crucial issues involved here, and the freedom of the press with respect to matters of public interest, the Court finds that it is appropriate to extend limited-purpose public figure status to plaintiffs.

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[1] The articles cited by defendants are: Michael Amon, *Building An Empire*, Newsday, Sept. 23, 2007; Michael Amon, *How A Long Island Nursing Home Empire Got Its Way*, Newsday, Sept. 23, 2007; Michael Amon, *Broken Promises From Manila to Mineola*, Newsday, Sept. 24, 2007; Tom Robbins, *The Sick Looting of Home Health Care*, Village Voice, Oct. 13, 2010; Nina Bernstein, *State Rebukes Home Care Firms Once Rebuked*, NY Times, June 23, 2013; Damian Ghigliotty, *Greystone and Sentosa Team Up for Long Island Nursing Development*, Commercial Observer, Mar. 31, 2015; James Nani, *Nursing Home Owners Embroiled in Lawsuits*, Times-Herald Record, Aug. 7, 2015.

Thus, the Court, upon reargument, adheres to its original determination that plaintiffs are public figures, and more specifically, limited-purpose public figures. As such, under the standard enunciated in *New York Times Co.* (376 US at 279-280 [1964]), the First Amendment bars recovery except where the statements at issue are found to have been published with actual malice with knowledge or reckless disregard of their falsity. Plaintiffs, in their instant reargument motion, argue that even if they may be considered limited-purpose public figures because they engage in business activities which are a matter of public concern, they have alleged actual malice with respect to their eighth and ninth claims. Specifically, plaintiffs state that their complaint alleges that defendants knew but did not report that SentosaCare facilities had pro-actively self-reported the criminal activities of an administrator and individual nurses, but, instead, defendants stated that this criminal activity was "discovered" by governmental authorities.

Plaintiffs' argument regarding the use of the term "discovered" was specifically addressed in the Court's Prior Decision. The Court, as previously discussed, found that there was nothing about the word "discover" that suggested more serious or widespread fraudulent, dishonest, or criminal conduct than that suggested in the official proceeding and summarized in the article. Since the Court found that the statements at issue were substantially accurate, they could not constitute published information that plaintiffs knew was false or statements published with reckless disregard of the truth.

"The actual malice standard recognizes that falsehoods relating to public figures are inevitable in free debate and that publishers must have sufficient breathing space . . . so that the First Amendment's commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open will be realized" (*Kipper v NYP Holdings Co., Inc.*, 12 NY3d 348, 355 [2009] [internal quotation marks and citations omitted]). Here, plaintiffs' theory of malice is predicated on their contention that defendants omitted facts favorable to them.

However, "[w]hether or not a particular article constitutes unbalanced reporting is essentially a matter involving editorial judgment and is not actionable" (*Sprecher v Dow Jones & Co.*, 88 AD2d 550, 551 [1st Dept 1982], *affd* 58 NY2d 862 [1983]).

Plaintiffs further argue that the Court should not have decided this issue at the motion to dismiss stage. To survive a motion to dismiss, however, a public figure plaintiff must "allege facts sufficient to show actual malice with convincing clarity" (*Jimenez v United Fedn. of Teachers*, 239 AD2d 265, 266 [1st Dept 1997], *appeal dismissed* 90 NY2d 890 [1997]; *see also New York Times Co.*, 376 US at 285-286; *Daniel Goldreyer, Ltd.*, 259 AD2d at 353). Here, the documentary evidence submitted by defendants flatly contradicts and disproves plaintiffs' theory of actual malice. Thus, plaintiffs' allegations which purport to assert malice were patently insufficient to survive a motion to dismiss.

Thus, while unnecessary to the Court's determination that defendants' motion to dismiss must be granted since dismissal is mandated pursuant to Civil Rights Law § 74, the Court provides clarification that plaintiffs were limited-purpose public figures, and they have not sufficiently alleged malice. Consequently, the Court, upon reargument, adheres to its original determination in this respect (*see* CPLR 2221[f]).

Conclusion

Based upon the foregoing, it is hereby,

ORDERED that plaintiffs' motion for reargument is granted, and, upon reargument, the Court adheres to its original determination; and it is further,

ORDERED that counsel for the defendants shall serve a copy of this Order with Notice of Entry upon the plaintiffs.

This constitutes the Decision and Order of the Court.

Dated: 8/13/19

PAUL WOOTEN J.S.C.